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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 309.

A. S. BADGER, COLLECTOR OF CUSTOMS OF THE PORT OF NEW ORLEANS, PLAINTIFF IN ERROR,

vs.

FRANK GUTIERREZ.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED SEPTEMBER 21, 1883.

SUPREME COURT OF THE UNITED STATES.

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a UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and eastern district of Louisiana.

A. S. BADGER, COLLECTOR, &C., PLAINTIFF IN error,
versus
FRANK GUTIERREZ, DEFENDANT IN ERROR. } No. 8976.

A. H. Leonard, U. S. att'y for plaintiff in error.

J. Ward Gurley, jr., and H. J. De Lesdernier, att'ys for defendant in error.

Writ of error returnable to the Supreme Court of the United States, at the city of Washington, D. C., on the second Monday of October, A. D. 1881.

1 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and eastern district of Louisiana.

FRANK GUTIERREZ
vs.
A. S. BADGER, COLLECTOR. } No. 8976.

Petition.—Filed January 14th, 1880.

To the honorable the judges of the circuit court of the United States for the fifth circuit and district of Louisiana:

The petition of Frank Guiterez, a citizen of the State of Mississippi, respectfully represents that A. S. Badger, collector of the port of New Orleans, and a citizen of the State of Louisiana, is justly and truly indebted unto petitioner in the full sum of nine thousand and thirteen $\frac{50}{100}$ dollars ($9,013.50), interest, and costs, for this, to wit, that on or about the first day of November, 1879, the said A. S. Badger, through his chief clerk, J. M. Tomlinson, at the Port of New Orleans, Louisiana, illegally

2 and unlawfully took from petitioner the license, enrollment, shipping articles, receipts, and all the papers belonging to or concerning the American schooner Theresa G., of which petitioner was then, and is now, master and owner; that the said A. S. Badger has continued since the said first day of November, 1879, or thereabouts, and still continues, illegally and without warrant of law, or probable cause, to detain and keep from petitioner or his use the said papers of said schooner, and refused to return to petitioner, although repeated demands have been made therefor, both by petitioner and his counsel, all which has greatly damaged and injured petitioner.

Now, petitioner represents that the said papers of the said schooner Theresa G, which were so illegally and unlawfully taken from petitioner, and are still illegally and unlawfully retained by said A. S. Badger, were duly issued in the usual manner as directed by law upon the application

of petitioner as master of said schooner Theresa G. for the use of
3 said schooner at her home port, Shieldsborough, Mississippi, by the collector of said port, and that petitioner had a vested right in said papers.

Petitioner further represents that upon the refusal of the said A. S. Badger to return said papers petitioner first applied to the collector of the port of Shieldsborough (that being the home port of said schooner) for the issuance of new papers, but the collector of Shieldsborough refused to issue new papers unless petitioner could make an affidavit that the old papers were lost; and thereupon petitioner made due and proper application to the said A. S. Badger, collector of the port of New Orleans, for the issuance of new papers for said schooner and the said A. S. Badger illegally and unlawfully refused to issue new papers or to return the old ones, to the great injury loss and damage of petitioner.

Further, petitioner represents that at the time the said papers were so illegally and unlawfully taken from petitioner by the said A. S.
4 Badger, the said schooner Theresa G was lying in Grand Caillou Bayou, opposite the Cragin plantation, near Houma, Louisiana, and was about to load a cargo of sugar, molasses, and other merchandise for this city, with a full crew on board and under wages.

That by and in consequence of the said illegal and unlawful acts and doings of the said A. S. Bagder petitioner has been unable to move said schooner or carry on her business as common carrier from the said 1st day of November, 1879, or thereabouts, to the present time; and is still prevented from navigating said schooner as a common carrier by said illegal and unlawful acts and doings of said A. S. Badger.

Further, petitioner represents that said illegal and unlawful acts and doings of said A. S. Badger, caused petitioner great vexation, trouble, and annoyance, and necessitated frequent trips from where said schooner was lying as aforesaid to New Orleans, and from New Orleans to Shieldsborough, &c.; and petitioner's time and attention were necessarily
5 so occupied in consequence of said illegal and unlawful acts and doings of said A. S. Badger, as aforesaid, that petitioner was obliged to neglect the business of a saw-mill, which he purchased on the 24' day of November, 1879, at Shieldsborough, and sustained a further loss thereby.

Further, petitioner represents that all of the injuries, losses, and damages caused to and sustained by petitioner through and in consequence of said illegal, unlawful, and wrongful acts and doings of said A. S. Badger are fully and in detail set forth and enumerated in the schedule hereto attached and made part of this petition.

That all of said illegal and unlawful acts and doings of the said A. S. Badger hereinbefore specifically set forth and complained of, were maliciously done by the said A. S. Badger, without probable cause; & he well knew the same to be unwarranted in law and not justified by the facts; and petitioner believes and alleges that all said illegal and wrongful acts
6 and doings were wilful on the part of said A. S. Badger, and for the purpose of annoying, harassing, and damaging petitioner.

Wherefore petitioner prays that the said A. S. Badger be cited to appear and answer this petition, and that after due proceedings had there be judgment against said A. S. Badger and in favor of petitioner, Frank Gutierrez, for the sum of nine thousand and thirteen $\frac{50}{100}$ dollars ($9,013.50),

with interest thereon at the rate of 5 per cent. per annum from judicial demand until paid; and petitioner prays for costs and all general and necessary relief in the premises.

(Signed) J. WARD GURLEY, JR., &
H. J. DE LESDENNIER,
Att'ys for Petitioner.

Schedule referred to in foregoing petition.

Loss of profits on 4 round trips to and from Grand Caillou and New Orleans, say $1,200	4,800 00
Wages of 4 seamen @ $20, say 2½ months	200 00
" " cook " $25, " " "	62 50
" " mate " $40, " " "	100 00
Provisions, $100 p'r month, " " "	250 00
7 Necessary repairs to vessel caused by barnacles forming on bottom & other damages resulting from lying in salt water	200 00
Demurrage during said repairs, say	250 00
Necessary travelling expenses incurred in endeavoring to get papers from Grand Caillou to New Orleans, and New Orleans to Shieldsborough	46 80
Loss of profits in not being able to run saw-mill at Jordan River, Miss	2,000 00
Counsel fees for services and advice in effort to obtain papers.	100 00
Telegrams concerning same	4 20
Worry of mind, vexation, and anxiety	1,000 00
Total	$9,013 50

Citation.—Issued January 14th, 1881.

UNITED STATES OF AMERICA,
District of Louisiana:

Circuit court of the United States, fifth circuit, district of Louisiana.

FRANK GUTIERREZ
vs.
A. S. BADGER, COLLECTOR, &C. } No. 8976.

To. A. S. BADGER:

You are hereby summoned to comply with the demand contained
8 in the petition of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit, and district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 14' day of January, A. D. 1880, and of the Independence of the United States of America, the 104' year.

Teste:

[SEAL.] (Signed) T. V. COUPLAND,
D'y Clk.

Marshal's return.

Received Jan'y 14, 1880, by the U. S. marshal, and on the 15th day of January, 1880, served a copy of the within petition and citation
9 on A. S. Badger, collector of port, by handing a copy of the same to him in person in the city of New Orleans.

(Signed) THOMAS BOSWELL,
D'y Marshal.

Exception.—Filed January 26, 1880.

FRANK GUTIERREZ
vs.
A. S. BADGER, COLLECTOR.

Defendant, as a peremptory exception to plaintiff's petition, avers that the allegations thereof disclose no cause of action.

Wherefore he prays to be hence dismissed with costs.

(Signed) A. H. LEONARD,
U. S. Att'y, Counsel for Def't.

Order.—Exception.—Cumulated, &c.—Extract from minutes November term 1870.

NEW ORLEANS, *Saturday, April 3d*, 1880.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, dist. judge.

F. GUTIERREZ
vs.
A. S. BADGER, COLLECTOR.

10 The exception herein came on to be heard, and after argument it was ordered by the court that said exception be cumulated with the answer to the merits.

Answer of A. S. Badger, collector.—Filed April 5th, 1880.

Circuit court, dist. of La.

FRANK GUITERREZ
vs.
A. S. BADGER, COLLECTOR. No. 8976.

Without prejudice to exception heretofore filed, and reserving all rights, defendant, A. S. Badger, for answer to plaintiff's petition, denies all and singular the allegations thereof except as herein admitted.

He admits that he is and was on dates stated in petition collector of customs of the United States for the port of New Orleans, and he avers

that all action taken by him with regard to the schooner Theresa G, or her master was exclusively taken in his official capacity in the proper discharge of his official duties and under instructions from the Treasury Department of the United States.

11 Respondent avers that the schooner Theresa G, whereof plaintiff was master, on or about the 9th day of September, A. D. 1879, cleared from Havana for Shieldsborough; that said master instead of proceeding to Shieldsborough ran said schooner, on or about the 29th Sept'r, 1879, into an inlet (Caillon Bay) located in another district, to wit, in the customs district of the Teche.

That instead of reporting the arrival of said schooner to the officers of customs of said district of the Teche, and making to them within forty-eight hours after arrival a further report in writing in the nature of a manifest as required by law, said schooner remained in said Caillon Bay for thirty days; and thirty days after such arrival said Gutierrez, while said schooner was still lying in said bay and said district of the Teche, proceeded to another district, and to the port *port* of Shieldsborough, and by making entry of said vessel as though she were then lying at the port of Shieldsborough, induced a subordinate officer of the collector of port of Shieldsborough to issue erroneously a coasting license and enroll-

12 ment for said schooner.

That shortly after said papers were so erroneously issued the collector of the port of Shieldsborough notified respondent of such error, and requested him to obtain and retain said papers.

That on or about the 1st Nov'r, 1879, said Gutierrez voluntarily delivered said papers to J. M. Tomlinson, chief clerk of respondent, as collector aforesaid, and respondent retained same as requested by the collector of the port of Shieldsborough, and in accordance with the instructions from the Secretary of the Treasury and other authorized officers of the Gov't.

That on or about the 4th Nov'r, 1879, the said schooner was libelled at suit of the U. S. for violation of provisions of section 2774, Revised Statutes of the U. S., as appears by the record in suit No. 11474, district court U. S. for district of Louisiana, hereby referred to as part hereof.

That respondent has not been instrumental in preventing the

13 departure of said schooner, from Caillon Bay, but that on the contrary he gave written permission for said schooner, on or about 18th Nov'r, 1879, to come to the port of New Orleans, and again on the 9th Jan'y, 1880, permission to come to Lookout customs station in respondent's customs district which permissions were the only papers respondent was then authorized to grant.

Respondent specially denies that said Gutierrez sustained any damages as alleged, and avers if any damage was sustained (which is not admitted) it resulted from violation of law upon the part of said plaintiff.

Respondent avers that his official action in the premises was based on probable cause and is in accordance with law.

Wherefore he prays that plaintiff's demand be rejected, and to be hence dismissed with costs.

(Signed.) A. H. LEONARD,
U. S. Attorney, Counsel for Defendant.

14 *Supplemental and amended petition.—Filed April 25th*, 1881.

U. S. cir. court, 5th circuit & eastern dist. of Louisiana.

FRANK GUTIERREZ
vs.
A. S. BADGER, COLLECTOR. } No. 8976.

To the hon. the judges of said court:

The supplemental & amended petition of Frank Gutierrez, a citizen of the State of Mississippi, respectfully represents that when petitioner filed his petition herein on the 14th Jan'y, 1880, petitioner could only estimate the amount of provisions which would be required during the delay ofpetitioner's vessel, Theresa G, arising from theunlawful acts of said A. S. Badger and his clerk, as alleged in said petition, and petitioner could only estimate the cost of the repairs to said vessel which were made necessary by the alleged and unlawful acts of said Badger and his clerks.

15 That at the time of the filing of said petition the repairs were not made and the necessary provisions for the time of the vessel's enforced delay were not purchased, and petitioner was unable to state the exact amount & cost thereof, & petitioner therefore estimated said cost & expenses at a sum whichpetitioner felt sure said repairs and provisions would amount to.

That since the filing of said petition has completed said necessary repairs upon his said vessel, and has paid the cost thereof, as well as the cost of the necessary provisions purchased; that the said provisions amount to seventy-five & $\frac{71}{100}$ dollars ($75.71) in excess of the two hundred and fifty dollars claimed in said petition, and that said repairs amounted to nine hundred and one $\frac{40}{100}$ dollars ($901.40) in excess of the two hundred dollars claimed in said petition.

Wherefore, petitioner prays that the said A. S. Badger be cited to answer this supplemental and amended petition, and that after due pro-

16 ceedings had there be judgment against said A. S. Badger, and in favor of petitioner for the sum of nine thousand and thirteen $\frac{50}{100}$ dollars ($9,013.50) with interest, as claimed in the petition filed herein January 14, 1880, and also for the further sum of nine hundred and seventy-seven $\frac{11}{100}$ dollars ($977.11) as herein set forth, with interest thereon from judicial demand until paid.

And petitioner prays leave to file this supplemental and amended petition and for costs and all general relief.

(Signed) J. WARD GURLEY,
H. J. DE LESDERUNIER,
Att'ys for Petitioner.

Service accepted, citation and time, and order for filing waived.
Ap'l 25, 1881.

(Signed) A. H. LEONARD,
U. S. Att'y.

17 *Hearing and continuance.—Extract from the minutes of May 2d, 1881.*

FRANK GUTIERREZ
vs.
A. S. BADGER, COLLECTOR. } No. 8976.

This case came on for trial.

J. Ward Gurley, jr., and H. J. Delesdernier, and G. Santini, for plaintiff. A. H. Leonard, U. S. attorney, for defendant.

When the following-named jurors were called and sworn to try the issue joined herein:

1. F. Hollander.
2. Pa'k Coyle.
3. A. W. Hyatt.
4. Valsin Boutte.
5. C. H. Dolsen.
6. E. Dejean.
7. H. Bonneval.
8. J. P. Casey.
9. Alp. Denis.
10. F. N. Gueringer.
11. M. Gras.
12. A. Bienvenu.

And the jury being completed the court appointed F. Hollander foreman thereof, and the trial proceeded.

And after hearing the pleadings and evidence the cause was con-
18 tinued until to-morrow at 11 a. m.

Hearing and continuance.—Extract from the minutes of May 3d, 1881.

FRANK GUTIERREZ
vs.
A. S. BADGER, COLLECTOR, &c. } No. 8976.

This cause, as continued from yesterday, was this day resumed, and the said counsel of the parties respectively, as well as of the said jurors in the cause, being all present, the trial was proceeded with.

And after hearing further evidence and arguments on behalf of plaintiff and defendant the cause was continued until to-morrow at 11 a. m.

19 *Verdict.—Extract from the minutes.—April term, 1881.*

NEW ORLEANS, *Wednesday, May 4, 1881.*

Court met pursuant to adjournment.

Present, Hon. E. C. Billings district judge.

FRANK GUTIERREZ
vs.
A. S. BADGER, COLLECTOR. } No. 8976.

This cause, as continued from yesterday, came on to be further heard, and the said counsel of the parties respectively, as well as the said jurors in the cause, except Patrick Coyle, who is ill and unable to attend, it was agreed by the counsel herein that the cause be tried by the eleven jurors present, and thereupon the trial was proceeded with, and after hearing the

closing of counsel on behalf of the plaintiff, and receiving a charge from the court, the cause was submitted to the jury, who thereupon retired to consider on their verdict.

After due deliberation they returned into court and then and
20 there, through their said foreman, they, the said jurors, did render and deliver the following verdict, viz:

We, the jury, find a verdict for the plaintiff in the sum of three thousand dollars. with interest from 14 Jan'y 1880.

New Orleans, May 4, 1881.

F. HOLLANDER, *Foreman.*

Whereupon it was ordered that the said verdict be recorded, and it is done accordingly.

Defendant's bill of exceptions.—Filed June 1st, 1881.

Circuit court U. S., 5th circuit.

FRANK GUTIERREZ
vs.
A. S. BADGER, COLLECTOR. } No. 8976.

Be it remembered that on the trial of this cause before a jury there was evidence introduced tending to show that the schooner Theresa G, whereof Frank Gutierrez was master, sailed from Havana on 9' Sept'r, 1879, bound for the port of Shieldsborough; that on or about the 29th Sept'r, 1879, said vessel arrived in Grand Caillon Bayou, an inlet
21 of the Gulf of Mexico, lying within the customs collection district of the Teche, that the arrival of said vessel was not reported to collector of the district of the Teche, but that on the 28' Oct., 1879, while said vessel was lying in said bayou and in said district of the Teche, Gutierrez reported the arrival of the vessel to collector's office at Shieldsborough, which was the port of her registration, and in the absence of the collector of that port, a deputy collector received from Gutierrez the foreign register of said vessel, and issued to him a coasting license and enrollment.

That on the 31st Oct. the collector at Shieldsborough wrote to Gen'l Badger, collector port New Orleans, stating that said papers had been issued improperly in his absence, and requesting him, Badger, to get them from Gutierrez; that on the 1st Nov'r, 1879, J. M. Tomlinson, chief clerk of Badger, collector, acting under instructions from Badger, found Gutier-
rez for the purpose of inspection, obtained the papers issued at
22 Shieldsborough from Gutierrez; that from this date Badger, acting under the advice or instructions of the Secretary of the Treasury, refused to deliver the ship's papers to Gutierrez, though demanded from him on the same day or subsequently.

That on the 4th Nov'r, 1879, on information given by Badger, collector, the Theresa G was libelled for violation of sec. 2774, R. S., on part of master, and seized by marshal on 16' Nov.; that on the 18' Nov., 1879, Gutierrez filed his claim and bonded the vessel, and she was delivered up to him.

That on 18th Nov'r, 1879, Gutierrez demanded from Badger the papers taken by Tomlinson, which Badger refused to deliver; that thereupon Badger reported the facts to the Secretary of the Treasury, who directed Badger to retain the papers issued at Shieldsborough, and subsequently directed Badger to send papers to Washington, D. C., which was done.

That on 18' Nov., 1879, Badger stated to Gutierrez that the Theresa G. might be brought from Caillon Bayou to New Orleans by SW.
23 Pass, Mississippi River, and he, Badger, thereupon sent to boarding officers written instructions to let vessel pass to New Orleans, but that Gutierrez declined to bring his vessel on such permission; that this permission was declined by Gutierrez on the ground that he must have in his possession documentary permission before he could safely navigate his vessel; that on 9th January, 1880, written permission was given by Badger, collector, to master of the Theresa G, to bring said vessel from Caillou Bayou to Lookout Station, in the collection district of New Orleans; that said vessel was thereupon brought to Lookout Station, and that on the 24' day of Jan'y, 1880, Collector Badger granted clearance papers to said vessel.

Be it remembered further, that at the conclusion of said trial the court charged the jury as follows: That the papers of the vessel were essential to her prosecuting navigation, and that it was not competent for the collector of the Teche district to have given to the Theresa G clearance papers under which she could have proceeded without the
24 production of the ship's papers detained by Badger; that the defendant had the right to seize the ship and for such seizure a judgment in another cause had established; that there was probable cause, but that if the jury found from the evidence that the defendant detained the papers of the ship at a time when the ship was not under seizure and which was not deposited with him for the purpose of the vessel's making an entry or clearance, that for such *distinction* the plaintiff could recover damages; that this recovery could be had even if the papers had been improperly issued by the collector at Shieldsborough; that detention of the ship's papers without giving her others, left here powerless to pursue any navigation of a vessel. To this instruction, and to each clause of the same, the attorney for the defendant, then and there and in the presence of the jury and before they withdrew to deliberate upon the case, excepted.

Be it further remembered, that A H. Leonard, U. S. attorney,
25 counsel for *for* Deft., asked the court to charge the jury as follows:

That the papers issued to Gutierrez as master Theresa G., at Shieldsborough, were erroneously and improperly issued, and when they came into the hands of Collector Badger it was his duty to retain them and report the facts to the Secretary of the Treasury, whose decision in the premises that said papers should not be restored to Gutierrez was correct; which instruction the court gave so far as relates to the erroneous and improper issuance of the papers at Shieldsborough, but otherwise refused to give to the jury, to which refusal the attorney for the defendant duly excepted.

Be it further remembered that the attorney for the defendant requested the court to instruct the jury as follows:

That the acts of defendant with reference to the Theresa G were done in his official capacity, were within the scope of his official duties, and

warranted by law, which instruction the court refused to give, to
26 which refusal the attorney for the defendant duly excepted.

Be it further remembered that the attorney for the defendant asked the court to instruct the jury as follows: That Gutierrez, while the Theresa G was lying in Grand Caillou Bayou, had applied to the collector of the district of the Teche for clearance such officer would have been bound, under the law, to issue necessary papers on the formalities of law being complied with; which instruction the court refused to give, but instructed the jury that, according to law, the collector of customs for the district of the Teche could not issue clearance papers except upon the production of a proper registry or other ship's papers, to which refusal, as well as to the said substituted instruction so given, the attorney for the defendant duly excepted.

Be it further remembered that the attorney for the defendant requested the court to instruct the jury as follows:

27 That good faith is always pursued until the contrary is shown, and if Badger acted in good faith or with probable cause he is not liable for a mistake in a matter in which he was obliged to exercise his judgment, even though an individual may have suffered from such action; which instruction the court refused to give, but instructed the jury that, while it was the duty of the collectors to seize vessels for probable cause, and that in so seizing they were justified, the defendant had no jurisdiction to seize and detain the papers of the vessel after the vessel was released from seizure, and if they found that the defendant had detained the papers of the vessel after her release from seizure he was liable for damages, if the jury found the plaintiff had suffered therein in consequence of such detention.

To which refusal and substituted instruction the attorney for the defendant duly excepted.

Be it further remembered that the attorney for the defendant re-
28 quested the court to instruct the jury as follows: That when Collector Badger learned a violation of law had been committed by the master of the Theresa G it became his duty to take steps to have the vessel libelled for such violation, and his duty to detain the vessel, by all means in his power; which instruction the court gave, provided the jury found the fact to be as related to a seizure and detention of the vessel, but refused so far as related to the detention of the vessel's papers after a release of the vessel.

To which qualification and refusal the attorney for the defendant duly excepted.

Be it remembered further that the attorney of the defendant requested the court to instruct the jury as follows:

That if the jury found from the evidence that Gutierrez, on the 18th Nov'r, 1879, had permission to bring the Theresa G to New Orleans that he could have availed himself of this permission, and on his arrival obtained such clearance papers as he might have been entitled to,
29 then he is not entitled to a judgment for any damages which may have resulted from the vessel remaining in Caillou Bayou; which instruction the court gave, with this qualification adding the words "after such permission was given."

To which qualification of said instruction the attorney for the defendant duly excepted.

Be it further remembered that *and* said attorney for defendant asked the court to charge the jury as follows:

That the collector of the collection district of the Teche was the proper officer to apply to for clearance papers of Theresa G. Being in Grand Caillou Bayou, could not lawfully proceed therefrom foreign or to another district without complying with requirements of R. S., sec. 4197, if going foreign, or of R. S., 4353, if to a port in another district, and if the master of the Theresa G had sailed from Caillou Bayou on the papers irregularly issued at Shieldsborough, he would have violated the law; which charges the court refused to give, except with the qualification that the collector of the collection district of the Teche could not have
30 issued clearance papers to the Theresa G without the production of proper ship's papers.

To which refusal and qualification, as affecting each claim of this request for instructions, the attorney for the defendant duly excepted, and since then matters do not appear of record.

The attorney has presented this his bill of exceptions, which is allowed and signed accordingly.

(Signed) EDWARD C. BILLINGS,
Judge.

Remittitur.—Filed June 13th, 1881.

Circuit court of the U. S. for 5th circuit & east. dist. of La.

FRANK GUTIERREZ
vs.
A. S. BADGER, COLLECTOR. } No. 8976.

Now comes plaintiff herein and enters this his remittitur of one thousand dollars ($1,000) on the judgment obtained by plaintiff against defendant, on the 4th day of May, 1881, as required by the order of this court herein entered on the 4th day of June, 1881.

31 (Signed) J. WARD GURLEY, JR.
HENRY J. DE LESDENNIER.

Judgment.—Extract from the judgment book, April term, 1881.

NEW ORLEANS, *Wednesday, May* 4, 1881.

Court met pursuant to adjournment.
Present, Hon. Edward C. Billings, dis't judge

FRANK GUTIERREZ
vs.
A. S. BADGER, COLLECTOR, &C. } No. 8976.

By reason of the verdict of the jury herein and in accordance therewith it is ordered, adjudged, and decreed that the plaintiff, Frank Gutierrez, do have and recover of the defendant, A. S. Badger, collector of customs for

the port of New Orleans, La., the sum of three thousand dollars, with interest thereon at the rate of five per cent. per annum, from 14' January, 1880, until paid, and costs of suit.

The court certifies that this was a suit against A. S. Badger, as
32 collector of the customs at the port of New Orleans, for an act done by him as such collector, and that in all that he did he acted under the directions of the Secretary of the Treasury.

Judgment rendered May 4, 1881.

Remittitur entered June 13th, 1881.

The plaintiff herein having remitted one thousand dollars on the judgment herein rendered, on May 4th, 1881, thereby reducing the sum to two thousand dollars—

It is ordered by the court that a new trial be refused.

Judgment signed June 14, 1881.

(Signed) EDWARD C. BILLINGS,
Judge.

Motion and order for writ of error.—Entered and filed June 16th, 1881.

U. S. circuit court, 5th circuit, eastern district, Louisiana.

F. GUTIERREZ
vs.
A. S. BADGER, COLLECTOR.

On motion of A. H. Leonard, attorney of the United States for said district, counsel for defendant, and on representing to the court that the
33 defendant is aggrieved by the final judgment herein rendered against him on the 14th day of June A., D. 1881, and is advised there is error therein to his prejudice, and desires that a writ of error, to operate as a supersedeas, be granted him therefrom, and on further suggestion that said writ of error is applied for under and in accordance with directions from the Treasury Department of the United States, it is ordered that a writ of error to operate as a supersedeas be allowed as prayed for, without bond, under section 1001, Revised Statutes of the United States, and be made returnable to the next October term of the Supreme Court of the United States.

34 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE:

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 33 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of Frank Gutierrez vs. A. S. Badger, collector, &c., No. 8976 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 3d day of August, A. D. 1881.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, Edward C. Billings, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 3d day of August, A. D. 1881.

EDWARD C. BILLINGS,
Judge.

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Frank Gutierez and A. S. Badger, collector of customs of the port of New Orleans, a manifest error hath happened to the great damage of the said A. S. Badger, collector of customs, as by his complaint appears;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 16th day of June, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

(Indorsed:) United States circuit court. No. 8976. A. S. Badger, collector of customs, plaintiff in error, versus Frank Guiterez, defendant in error. Writ of error. Filed June 16th, 1881. T. V. Coupland, d'y cle'k.

36 THE UNITED STATES OF AMERICA:

Circuit court of the United States, eastern district of Louisiana.

The President of the United States to Frank Gutierrez, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the

second Monday of October next, pursuant to a motion and order for a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein A. S. Badger, collector of customs of the port of New Orleans, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgmen rendered against the said A. S. Badger, collector of customs of the port of New Orleans, as in said motion and order for a writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 16th day of July, in the year of our Lord one thousand eight hundred and eighty-one.

EDWARD C. BILLINGS,
Judge.

37 (Indorsed:) United States circuit court. No. 8976. A. S. Badger, collector of customs of the port of New Orleans, plaintiff in error, vs. Frank Gutierrez, defendant in error. Citation.

Marshal's return.

Received July 22, 1881, by the U. S. marshal, and on July 26th, 1881, I served a true copy of the within writ of error on Frank Gutierrez, defendant in error herein, by handing the same to J. Ward Gurly, jr., esq., in person, in the city of New Orleans, the attorney for the aforesaid Frank Gutierrez, he accepting service for said def'd't in error.

E. S. CURRY,
Dep'y U. S. Marshal, for Eastern Dist. of Louisiana.

Personally appeared before me E. S. Curry, a lawful deputy of Jack Wharton, U. S. marshal for eastern district of Louisiana, and make oath that he served a true copy of the within writ of error on the defendant in error as set forth in his official return herein.

E. S. CURRY,
D'y U. S. Marshal, for Eastern Dist. of La.

Subscribed and sworn before me August 1st, 1881.

T. V. COUPLAND,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

(Indorsement on cover:) No. 309. A. S. Badger, collector of customs of the port of New Orleans, plaintiff in error, *vs.* Frank Gutierez. E. Louisiana C. C. U. S. Filed 24' September, 1881.

111-734

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

BADGER, COLLECTOR, &c., *v.* GUTIERREZ. } No. 309.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

BADGER, COLLECTOR, &C., v. GUTIERREZ. } No. 309.

BRIEF FOR THE UNITED STATES.

This is an action brought to recover damages for the detention of the coasting license and enrollment of a schooner.

In September, 1879, the schooner (the Theresa G.) was engaged in trading betwixt Havana, in Cuba, and Shieldsborough, Miss., the latter being its home port. Upon the 29th of that month it arrived from Havana at Grand Caillou Bayou, in Louisiana, west of the Mississippi, and after staying there about a month the master, Gutierrez, reported its arrival to the collector's office at Shieldsborough, and in the absence of the collector exchanged its foreign register, and received a coasting license and enrollment. Three days afterward that collector wrote to Badger, the collector at New Orleans, requesting him to procure such license and enrollment from Gutierrez, as

having been improperly issued. They were accordingly surrendered (November 1, 1879). Upon the 4th of November the schooner was seized by Badger to enforce the provisions of section 2774 of the Revised Statutes (which inflicts a penalty of $1,000 for failure to report the *arrival* of a vessel within twenty-four hours thereof). Upon the 18th of November the schooner was bonded, and thereupon Gutierrez demanded the papers previously surrendered to Badger. Upon application by Badger, the Secretary of the Treasury directed that these should not be given up; and in the end, under further orders, they were sent to Washington.

The damages claimed are for the detention of the papers and, consequently, of the schooner until the 9th of January, 1880.

The above is an outline of the facts which appear in the bill of exceptions. (Record, pp. 8, &c.)

Upon this state of facts the court instructed the jury that—

> "If the jury found, from the evidence, that the defendant detained the papers of the ship at a time when the ship was not under seizure, and which was not deposited with him for the purpose of the vessel making an entry or clearance, that for such detention the plaintiff could recover damages; that this recovery could be had even if the papers had been improperly issued by the collector at Shieldsborough; that detention of the ship's papers, without giving her others, left her powerless to pursue any navigation of a vessel."

This instruction was duly excepted to; and, upon behalf of the collector, the court was asked to charge the jury—

> "*That the papers issued to Gutierrez, as master of the Theresa G., at Shieldsborough, were erroneously and improperly issued; and when they came into the hands of Collector Badger it was his duty to retain them and report the facts to the Secretary of the Treasury, whose decision in the premises, that said papers should not be restored to Gutierrez, was correct.* Which instruction the court gave so far as relates to the erroneous and improper issuance of the papers at Shieldsborough, but otherwise refused to give to the jury; to which refusal the attorney for the defendant duly excepted." (Folio 25.)

This prayer for instructions was made under several forms. These appear to justify an assignment of error, as follows:

That the court held that a vessel engaged in foreign commerce which shall be in any other district than the one to which it belongs, can make an effective exchange of its register for an enrollment otherwise than in the manner prescribed in section 4323 of the Revised Statutes.

The court indeed held that the issue of the enrollment and license was erroneous, but negatived the effect of such holding by ruling farther that, notwithstanding, the vessel was entitled to them as against the United States, acting through one of their officers, and could make legitimate use of them in navigation.

It is submitted, to the contrary, that the true issue from the predicament in which the vessel had been placed by the action of its master in reporting at Shieldsborough, &c., was to apply to the collector at Shieldsborough for a return of the register, and then to make use of that in obtaining proper papers from the collector of the Teche, under section 4323, below. In judgment of law it is this neglect of the true remedy for his own previous miscarriage, that (to make use of the above language of the learned court below) *left the vessel powerless to pursue any navigation.*

Badger was not asked for the register; and indeed it seems that he never had it. Perhaps Gutierrez might have properly refused to surrender the enrollment to Badger in the first instance unless the latter had produced the register that had been given up at Shieldsborough. But, however that may be, it is submitted that Gutierrez made demand of the wrong paper; and had an inchoate cause of complaint, if against any one, against the collector at Shieldsborough, upon whom, however, he made no requisition.

Sections 4322 and 4323 of the Revised Statutes are as follows:

> "The collectors of the several districts may enroll and license any vessel that may be registered, upon such registry being given up, or may register any vessel that may be enrolled, upon such enrollment and license being given up."

> "When any vessel shall be in any other district than the one to which she belongs, the collector of

such district, on the application of the master thereof, and upon his taking an oath that according to his best knowledge and belief the property remains as expressed in the register or enrollment proposed to be given up, and upon his giving the bonds required for granting registers, shall make the exchange of an enrollment for a register or a register for an enrollment; but in every such case the collector to whom the register or enrollment and license may be given up shall transmit the same to the Register of the Treasury, and the register, or enrollment and license, granted in lieu thereof, shall, within ten days after the arrival of such vessel within the district to which she belongs, be delivered to the collector of the district and be by him canceled. If the master shall neglect to deliver the register or enrollment and license within such time he shall be liable to a penalty of one hundred dollars."

The question seems to be, whether section 4323 prescribes the only method by which vessels in the situation there described can exchange registers for enrollments. The provisions upon the general subject of registers, &c., seem too elaborate to reproduce within a brief in a case where as here their bearing is only indirect (see Rev. Stats., pp. 795, &c., and 833, &c.). I do not find that ordinarily upon any *renewal* of their registers, &c., vessels are required to be present at their home ports. But the words of section 4323 are thought to imply that the method there mentioned is *exclusive*. In matters of mere *positive* regulation, such as that section is concerned with, no reason occurs why methods which the legislature prescribes are not intended to be *the only methods*. The reason for

prescribing any forms, supposing the language not to be merely permissive, indicates that these are to be *the forms*. And such seems to have been the view of the learned court below; a view which, however, for some reason or other, it declined to pursue to a legitimate conclusion.

S. F. PHILLIPS,
Solicitor-General.

111-734

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 309.

A. S. BADGER, COLLECTOR, ETC., PLAINTIFF IN ERROR,

versus

FRANK GUTIERREZ, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

The case for Frank Gutierrez is stated in his petition and supplemental petition (Record, pages 1 to 3 and 6).

The papers of a vessel are as much the property of the vessel's owners as the vessel itself. Owners have a vested right in them, of which they can only be deprived in the manner provided by law.

It cannot be denied that the papers of a vessel are essential for her navigation. The law requires that she shall have them.

Any one who takes and detains from the master and owners a vessel's papers, without due and proper process of law, commits a wrong and is liable in damages.

The amount of the damages is for the jury to determine, and it is, therefore, not material whether the collector of another, the District of the Teche, where the vessel happened to be, could have *afterwards* issued to the master new papers without the production and surrender of the old ones. It is clear, however, from Sections 4322, 4323, 4326, 4327, 4328, and all the sections of the Revised Statutes relative to the registry and enrollment of vessels, that he could not. The master could not make

the prescribed affidavit that his license was "lost, or destroyed, or unintentionally mislaid," and as long as his papers were detained by Collector Badger, it was impossible for him to either get new papers, or have his bond for the old ones cancelled. Collector Badger and the Honorable Secretary of the Treasury finally recognized such to be the fact, and admitted the entire correctness of the master's position by issuing clearance papers to him on the 24th of January, 1880, ten days after the institution of this suit. (Record, page 9). All the questions raised in the bill of exceptions, by which this cause is now presented, are elementary and well settled. No extended argument is necessary before this court, in answer. Both the law and the decisions are directly opposed to each and all of the exceptions.

Collector Badger and the Honorable the Secretary of the Treasury simply made a mistake, as they afterwards seem to have concluded, or were advised.

"The collector of the customs is a ministerial officer; he acts under the instructions of the Secretary of the Treasury, who is expressly authorized to give instructions as to the due enforcement of the revenue laws.

"Do these instructions, when not given in accordance with the law, afford a justification to the collector, or exonerate him from the payment of adequate damages for an injury resulting from his illegal acts?

"The Circuit Court, in their charge to the jury, did not consider these instructions as a justification to the defendant; and in this they were unquestionably correct.

"The Secretary of the Treasury is bound by the law; and although, in the exercise of his discretion, he may adopt necessary forms and modes of giving effect to the law, yet, neither he nor those who act under him can dispense with or alter any of its provisions. It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress."

Tracy & Balestier vs. Swartevont, 10 Peters, at page 95.

"Some personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior, but, as the Government, in such cases, is bound to indemnify the officer, there can be no eventual hardship." Same case at page 99.

"The construction of the law is open to both parties, and each presumed to know it. Any instructions from the Treasury department could not change the law, or affect the rights of the plaintiff. He was not bound to take and adopt that construction. He was at liberty to judge for himself and act accordingly."

Elliott vs. Swartevont, 10 Peters, at page 153.

It is submitted the judgment herein of the Circuit Court should be affirmed with interest and costs.

Very respectfully,

J. WARD GURLEY, JR.,
Attorney for Defendant in Error.